

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE COMMISSIONER OF HUMAN SERVICES

In the Matter of the Temporary
Immediate Suspension of the Family
Child Care License of Sonji Kennedy
To Provide Family Day Care

**FINDINGS OF FACT,
CONCLUSIONS AND
RECOMMENDATION**

The above matter came on for a contested case hearing before Administrative Law Judge M. Kevin Snell ("ALJ") at the Hennepin County Health Services Building, 525 Portland Avenue, Minneapolis, Minnesota 55415, on September 7, 2012. The hearing record closed on September 19, 2012, upon receipt of post-hearing submissions.

Grace C. Song, Assistant Hennepin County Attorney, Minneapolis, Minnesota, appeared on behalf of the Department of Human Services (the Department) at the hearing. Mark J. Kallenbach, Esq., Minneapolis, Minnesota, appeared on behalf of the Licensee, Sonji Kennedy.

STATEMENT OF THE ISSUE

The issue is whether or not there is reasonable cause to believe that the health, safety or rights of children in Ms. Kennedy's care are at imminent risk of harm at this time.

The Administrative Law Judge concludes that there is reasonable cause to believe that children in Licensee's care remain at imminent risk of harm.

Based on the evidence in the hearing record, the Administrative Law Judge makes the following:

FINDINGS OF FACT

1. Ms. Kennedy (also herein "Licensee") has been licensed to provide family child care services for seven years doing business as "Haven 4 Kids," and had done so in her home in North Minneapolis, Minnesota (the "home") until August 9, 2012, when her license was temporarily suspended.¹

¹ Ex. 1; Testimony of Sonji Kennedy and Timothy Hennessey, Senior Social Worker and Quality Assurance Specialist for Hennepin County Human Services and Public Health Department (the County).

Licensee's Program Conditions

2. Prior to opening the day care, Licensee and her husband completely gutted and remodeled the home to make it perfect for a day care, expending \$150,000.00 in doing so.² Licensee's day care home is clean and well kept.³ It also has a six-foot wooden fence around the property. Within the fence is a newer, modern "jungle gym" for the children to play upon.⁴ Licensee is absent from the day care during day care hours a total three hours per week, usually only on one day a week to go to the bank or grocery store.⁵

3. Licensee has an adult daughter, Semaj Kennedy, who has worked for Licensee as a caregiver since she graduated from high school in 2007.⁶

4. In August 2009, Licensee hired her very good friend of 14 years, Monique Walls, as a caregiver. Licensee relies on Ms. Walls as the disciplinarian for day care children because that role suits Ms. Walls' personality better than Licensee's. Licensee is better suited to teach and play with the children, preferring to give them hugs and kisses rather than impose discipline.⁷

5. Monique Walls always talks loud and yells at the day care children often. She also routinely uses inappropriate language, such as constantly telling children to "shut up."⁸

6. Licensee and Ms. Walls utilize a plastic rod taken from a blind or curtain pull as a pointer when educational activities are being conducted. The rod is referred to as "the stick." Licensee and Ms. Walls also utilize "the stick" to rap on a table to get the attention of the children.⁹

7. Licensee cares for an infant boy who is teething. The teething causes him pain. His mother provides licensee with medicine to administer to the child when he is suffering from discomfort. The mother refers to the medicine as "baby crack." Licensee and her caregivers also refer to the medicine as "baby crack."¹⁰

8. Licensee always utilizes baby monitors in the upstairs rooms where infants sleep. Normally, a caregiver checks on sleeping infants every ten minutes. Children outside can be both seen and heard from windows looking out into the fenced-in back yard.¹¹

² *Id.*

³ Test. of T. Hennessey; Exs. 15-3, 15-5, 15-6, 15-9 to 15-12.

⁴ *Id.*; Test. of So. Kennedy; Exs. 15-7, 15-8, 15-13.

⁵ Test. of So. Kennedy.

⁶ Test. of Semaj Kennedy.

⁷ Test. of So. Kennedy; Exs 15-1, 15-2.

⁸ Test. of Se. Kennedy.

⁹ *Id.*; Test of So. Kennedy.

¹⁰ *Id.*; Test. of the infant's mother.

¹¹ Test. of So. Kennedy and Se. Kennedy.

9. There are two duplexes behind Licensee's property that are undergoing remodeling. Because the contractors are careless about debris, neighborhood children search through the debris and throw it around. Sometimes items are thrown into Licensee's back yard. Because of those occurrences, every day before the day care children go outside to play, Licensee and her daughter go outside, inspect the yard and wipe off the playground equipment.¹²

10. On one occasion in July 2012, a child found part of a dull blade in the back yard and took it home with him without telling Licensee about it. When she learned about the blade, Licensee composed a letter on July 18, 2012 and sent it to all day care parents. The letter provides in relevant part:

This summer more than usual we have been finding pieces of steel and glass and metal objects in the yard. We think it is coming from the construction that is being done on the houses behind us. While we go through the yard daily to check for garbage we do not always find everything. While most of the kids are very good at giving us things to throw away when they find it, sometimes they don't. Please help us by talking to your child and reinforcing them to not play with items that they find out in the yard that is not a toy. We do not want anyone hurt by sharp objects.¹³

The County Licenser considers the contents of the July 18, 2011 letter appropriate.¹⁴

Licensee's Licensing History

11. On April 21, 2011 County Child Protection (CP) received a report of physical abuse of a four-year-old day care child at Licensee's day care by Monique Walls. The report stated that:

- a. The child cried when it was time to go to Licensee's day care; and
- b. The child reported that Monique "whoops" her with "a stick" "upstairs;" and
- c. The child cried, "I want to go home" when dropped off at the day care.

CP screened out the report because the allegation did not meet the criteria for investigation: evidence of physical injury.¹⁵

12. Licensee spoke with the County Licenser about the April 21, 2011 allegations. She also called the parents of each of the day care children enrolled and

¹² Test of So. Kennedy.

¹³ *Id.*; Ex. 12.

¹⁴ Test. of T. Hennessey.

¹⁵ *Id.*; Ex. 1.

asked if Monique had spanked any of their children. They each reported that she had not. Licensee accepted Ms. Walls denial of striking the child.¹⁶

13. On May 22, 2012, the County recommended to the Department that Licensee's license be placed on conditional status and a fine be issued because of violations of the regulations regarding the required ratio of caregiver staff to children. That negative action recommendation is pending at the Department.¹⁷

July 18, 2012 and July 19 2012 Recordings

14. The mother of two day care children, ages 22 months and three years old, became concerned when her three-year-old began telling her that he did not want to go to day care at Licensee's home because "they were mean to him and yelled at him." She had previously been concerned about Licensee's day care because of what she perceived as a lack of supervision when she observed all children outside in the yard when all caregivers remained inside. She was also concerned because the 22-month-old child had received scratches to his face while in Licensee's care three times in three consecutive weeks. Licensee claimed she did not know about two of the injuries and that the three-year-old brother caused the third.¹⁸

15. On July 18, 2012 and July 19, 2012, the mother of the two boys placed a digital recording device in the diaper bag of her 22-month-old son. She left the diaper bag at Licensee's home where it recorded for an approximate total of 27 hours.¹⁹

16. The first hour of the recording, during which time Licensee was present, contains typical day care sounds and conversations, but also includes the following conversations and statements:

Licensee: Everyone sit down and be quiet, if you don't you will go upstairs to bed.

Monique Walls: "Do you want to get it? Hit him again."

Monique Walls, in an angry voice: "[name of child] you get ready to go upstairs and lay down."

Semaj Kennedy to infant: "Move [name of infant] move" (followed by a sound that could be a slap and the infant begins crying), "Stay out of the way, kid. [name of infant] I don't want you!" (while infant is still crying) "Do you want some baby crack?"

Monique Walls: "No, he is going upstairs."

Semaj Kennedy to infant: "You want some baby crack or go upstairs?"

¹⁶ *Id.*; Test. of So. Kennedy

¹⁷ Ex. 4; Test. of T. Hennessey.

¹⁸ Exs. 2, 3, 5, and 6; Test. of So. Kennedy.

¹⁹ *Id.*; Ex. 8.

Monique Walls to infant: "Don't make me pick your ass up. Shut up [name of infant]."

Monique Walls screaming at child: "You can go right upstairs," together with a sound that could be a child being hit.

Monique Walls: "Shut up baby."

Monique Walls: "Shut up" (another female is yelling in the background).

Monique Walls: "Cut it out! He need a spanking. Take him upstairs. I am done with that. Yesterday was enough. I can't have one kid stressing me out. Bye-Bye. Love you but bye-bye. If you want to cry, cry upstairs."

Monique Walls, yelling: "[name of child] you better color that picture right. Wanna go upstairs? Color your picture."

Monique Walls yelling at infant: "[name of infant] move! [name of infant] No! [name of infant] No!"

Semaj Kennedy to infant: "[name of infant] move! Leave me alone, Kid. I don't even like you, yeah right."

Monique Walls yelling at infant: "[name of infant]!" Infant begins crying. "You can go right upstairs! Shut your mouth!"

Monique Walls to a child: "You open that gate you're gonna get a spanking," followed by a sound that could be a child being slapped.

Monique Walls screaming at the crying infant: "You better stop that. You better cut that out right now!" Shut up! You better shut up! Shut up."

Monique Walls to a child: "Give it back. I'm gonna get my stick."

Monique Walls screaming at a crying child: "Get that out of your mouth! Get it away from me!" followed by crying child being taken up to bed, and "You're going to learn today dude. That was the wrong move to do. I was the wrong one to mess with. You really shouldn't have did that to me. You're out of here, buddy."²⁰

17. Semaj Kennedy took the infant upstairs because "he was acting a fool."²¹

18. After having left the infant upstairs for over two hours, Semaj asked Licensee if she should check on the infant, Licensee replied, "Leave him be."²²

²⁰ Exs. 5 and 8.

²¹ Test. of Se. Kennedy.

²² *Id.*

19. The mother of the two boys listened to portions of the digital recordings from July 18, 2012 and July 19, 2012.²³

20. The remainder of the recordings contain similar sounds and conversations as the first hour. Licensee was present during the remainder of the recordings, with the exception of approximately 28 minutes.²⁴ During the course of two days of recordings, children are told to “shut up” in excess of 30 times. Children are threatened with spanking or being hit at least ten times. In conversations with children the term “ass” is used at least nine times. In conversations with children the term “shit” is used at least six times. In conversations with children present, children are referred to as “nigger” six times. In conversations with children present, the term “fuck” is used at least five times. In conversations with children present, the term “bitch” is used twice.²⁵

21. When she brought her boys into Licensee’s for day care at 8:30 a.m. on July 20, 2012, the mother of the two boys was very quiet. Licensee asked her if anything was wrong. She replied, “Yes, but I will talk about it to you later.” Licensee told her that Licensee did not want her to leave if something is wrong. She reported that her older son had told her that Monique had hit him and that Monique had been mean to him.²⁶

22. As the mother of the boys was about to leave, Monique Walls came in and the boys’ mother “went berserk” and attempted to attack Ms. Walls. Licensee put her arms around the boys’ mother and carried her to the back door and out into the back yard. While the boys’ mother was screaming in the back yard, Licensee told Ms. Walls to leave. Ms. Walls retrieved her purse and left. Ms. Walls has not been allowed back to Licensee’s day care since that time.²⁷

23. After Ms. Walls’ departure, the boys’ mother told Licensee about the recording and stated, “I hear Monique being mean to the kids. You know that it ain’t you. It’s that bitch. It ain’t you. It’s her.” Licensee gave her word to the boys’ mother that Monique would not be coming back to Haven 4 Kids. Licensee asked the boys’ mother if she wanted to leave her kids with Licensee. She replied, “No, my kids are staying if you’re telling me that. I am OK. I don’t have a problem with you or Semaj.” She left the boys with Licensee and went to work.²⁸

24. Some time prior to July 20, 2012, Semaj Kennedy had told Licensee that Monique Walls was mean to the children when Licensee was not present.²⁹

25. On Monday, July 23, 2012, the mother of the boys came to Licensee’s home and advised Licensee that she had prayed all weekend and had come to the

²³ Exs. 5 – 8.

²⁴ Ex. 8 at 52:57 to 1:20: 30.

²⁵ Ex. 8.

²⁶ Test. of So. Kennedy.

²⁷ *Id.*

²⁸ *Id.*

²⁹ Test. of Se. Kennedy.

decision to remove her boys from Licensee's care. She advised Licensee, after having listened to the recordings, that she concluded that Licensee should have known what was going on and that she did not think that Licensee was supervising Monique. She did not return her boys to Licensee's care.³⁰

Licensing, Child Protection, and Law Enforcement Investigations

26. On July 24, 2012, County Licensing received a complaint about Licensee's day care program, specifically, that:

Monique Walls yells and curses at the day care children; and

Monique Walls calls children name including "whore" and "fairy;" and

A fussy infant was placed in an upstairs bedroom for approximately two hours, and when Licensee was asked if he should be checked on, she said, "Leave him be;" and

Day care children are left unsupervised outside while three caregivers watch television inside.

The County Licenser forwarded the Licensing Complaint to County Child Protection.³¹

27. On July 31, 2012, the County Licenser received additional information from the mother of the two boys. She reported that her 22-month-old son had come home three weeks in a row with scratches on his face. The first week there was one scratch on his right cheek. The second week there were two scratches on his right cheek. The third week there were two scratches on the right cheek and one scratch on his nose. The Licensing Investigator received a photograph of the third week injuries. Licensee did not report the injuries to the parents at the time of their occurrence. The boys' father discovered the injuries each time. When asked about the injuries, Licensee did not know how the scratches occurred the first two weeks and stated that the scratches from the third week were caused by the boy's three-year-old brother.³²

28. Also on July 31, 2012, the mother reported that Licensee admitted to her that Semaj Kennedy would always tell Licensee that "Monique is so mean when you are gone" and that, in spite of that knowledge, Licensee retained Ms. Walls as a caregiver.³³

29. Finally, the mother reported that her three-year-old son had recently been talking about "booty" and playing with his private parts a lot. She now wonders if he

³⁰ Test. of So. Kennedy.

³¹ Ex. 5; Test. of T. Hennessey.

³² Ex. 6.

³³ *Id.*

saw or had anything happen to him by one of the other kids since she thinks they are not supervised when they are sleeping.³⁴

30. On August 9, 2012, CP accepted a complaint for investigation. The CP investigation is in process.³⁵

31. On August 10, 2012, CP forwarded its intake report to the Minneapolis Police Department for investigation and it was assigned to an officer for investigation.³⁶

Parent Confidence in Licensee's Program Conditions and the Safety of Their Children in Licensee's Care

32. Licensee has the confidence and unconditional support of 15 current and former day care parents, representing 16 children that have been in Licensee's care. They universally believe that Licensee is an exceptionally skilled and caring family child care provider. These parents, only two of whom have heard portions of the recordings, have no concerns for the safety of children while in Licensee's care. The mother of the infant was one of the parents that heard a brief portion of the recordings. She, however, concluded that the language used by Ms. Walls was inappropriate. The parents are anxious to return their children to Licensee's care. Some have been subjected to difficulties of missing work and in obtaining child care of quality equal to that supplied by Licensee.³⁷

Procedural Findings

33. On August 7, 2012, the County License Investigator received a copy of the July 18, 2012 and July 19, 2012 recordings and listened to the first hour of the recordings.³⁸

34. On August 8, 2012 the County family child care licensor, relying on the initial and subsequent complaints, the first hour of the recordings, recommended to the Department that Ms. Kennedy's family child care license be immediately suspended.³⁹

35. On August 9, 2012, the Department issued an Order of Temporary Immediate Suspension (the "Order") of Licensee's family child care license.⁴⁰

36. On August 12, 2012 Licensee filed a timely appeal from the Order of Temporary Immediate Suspension and requested an appeal hearing pursuant to Minn. Stat. § 245A.07, subd. 2a.⁴¹

³⁴ *Id.*

³⁵ Ex. 3; Test. of T. Hennessey.

³⁶ Ex. 3.

³⁷ Exs. 13-1 through 13-18, 13-27 – 13-29; Test. of the infant's mother.

³⁸ Ex. 5; Test. of T. Hennessey.

³⁹ *Id.*; Ex. 4.

⁴⁰ Ex. 9.

⁴¹ Ex. 10.

37. On August 14, 2012 the Department executed a Notice of and Order for Hearing, scheduling a contested case hearing for September 7, 2012.⁴²

38. On August 27, 2012 the Administrative Law Judge issued a Prehearing Order and Protective Order, which was served upon the parties that day.

Based on these Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS

1. The Commissioner of Human Services and the Administrative Law Judge have jurisdiction in this matter pursuant to Minn. Stat. §§ 14.50 and 245A.07, subds. 2 and 2a.

2. The Department of Human Services gave proper and timely notice of the hearing in this matter.

3. The Department has complied with all relevant substantive and procedural requirements of law and rule.

4. The purpose of family child care licensure statutes and rules is to protect the care, health and safety of children.⁴³

Temporary Immediate Suspension Standards and Reasonable Cause

5. Minn. Stat. § 245A.07, subd. 2. provides, in applicable part:

If the license holder's actions . . . or the actions of other individuals or conditions in the program pose an imminent risk of harm to the health, safety, or rights of persons served by the program, the commissioner shall act immediately to temporarily suspend the license.

6. In order to maintain a temporary immediate suspension under Minn. Stat. § 245A.07, subd. 2, the Department must show that reasonable cause exists to believe that Licensee's failure to comply with applicable law or rule or the actions of other individuals, poses a current imminent risk of harm to the health, safety, or rights of persons served by her.

7. At hearing, the burden of proof is on the Department to show that reasonable cause exists to believe that the license holder's actions or failure to comply with applicable law or rule, the actions of another, or the conditions in the program, poses, at the time of the hearing, an imminent risk of harm to the health, safety, or rights of persons served by the program.⁴⁴

⁴² Notice and Order for Hearing.

⁴³ Minn. Stat. § 245A.07, subd. 1; Minn. R. 9502.0325.

⁴⁴ Minn. Stat. 245A.07, subd. 2a.

Applicable Definitions

8. "Reasonable cause" for the purpose of a temporary immediate suspension means:

there exist specific articulable facts or circumstances which provide the commissioner with a reasonable suspicion that there is an imminent risk of harm to the health, safety, or rights of persons served by the program.⁴⁵

24. Under Minn. Stat. § 626.556, subd. 2 (e), the "person responsible for the child's care" is defined in applicable part:

(2) an individual functioning outside the family unit and having responsibilities for the care of the child such as a teacher, school administrator, other school employees or agents, or other lawful custodian of a child having either full-time or short-term care responsibilities including, but not limited to, day care, . . .

25. Minn. R. 9502.0365, subp. 5 provides:

Supervision and use of substitutes. A licensed provider must be the primary provider of care in the residence. Children in care must be supervised by a caregiver. The use of a substitute caregiver must be limited to a cumulative total of not more than 30 days in any 12-month period.

26. As the licensed day care provider, Licensee is the primary provider of care in the residence⁴⁶ providing daycare to the children on and before August 9, 2012, and was the "person responsible for the child's care," as defined in Minn. Stat. § 626.556, subd. 2 (e).

Family Child Care Law and Rules Alleged to Have Been Violated

27. Neglect of a child constitutes maltreatment.⁴⁷ Neglect is defined to mean:

failure to provide for necessary supervision or child care arrangements appropriate for a child after considering factors as the child's age, mental ability, physical condition, length of absence, or environment, when the child is unable to care for the child's own basic needs or safety, or the basic needs or safety of another child in their care.⁴⁸

9. Minn. Rule 9502.0315, subp. 29a defines Supervision as follows:

⁴⁵ *Id.*

⁴⁶ Minn. R. 9502.0365, Subp. 5. Minnesota Rules are cited to the 2011 Edition.

⁴⁷ Minn. Stat. § 626.556, Subd. 2., (c) (3).

⁴⁸ Minn. Stat. § 626.556, Subd. 2., (f) (2).

'Supervision' means a caregiver being within sight or hearing of an infant, toddler, or preschooler at all times so that the caregiver is capable of intervening to protect the health and safety of the child. For the school age child, it means a caregiver being available for assistance and care so that the child's health and safety is protected.

10. Minn. R. 9502.0395 regarding **BEHAVIOR GUIDANCE** provides in relevant part as follows:

Subpart 1. **Methods.** Caregivers shall give each child guidance that helps the child acquire a positive self-concept, self-control, and teaches acceptable behavior.

. . .

B. Behavior guidance used by caregivers must be constructive, positive, and suited to the age of the child. Methods of intervention, guidance, and redirection must be used.

Subp. 2. **Standards.** The following shall apply to all caregivers when guiding behavior in children.

A. No child shall be subject to corporal punishment or emotional abuse. "Corporal punishment" means the nonaccidental infliction of physical pain on a child by a caregiver. Corporal punishment includes, but is not limited to, rough handling, shoving, hair pulling, ear pulling, shaking, slapping, kicking, biting, pinching, hitting, and spanking. "Emotional abuse" means the infliction of verbal or psychological abuse on a child by a caregiver. Emotional abuse includes, but is not limited to, name calling, ostracism, shaming, derogatory remarks about the child or child's family, and threats which threaten, humiliate, or frighten the child.

B. Food, light, warmth, clothing, and medical care shall not be withheld from the child.

. . .

D. The separation of a child from a group to guide behavior must be appropriate to the age of the child and circumstances requiring the separation.

E. An infant shall not be separated from the group for disciplinary reasons.

F. A child shall not be separated from the group for a period longer than ten minutes.

11. Minn. R. 9502.0415, subp. 4B, regarding **Newborn or infant activities**, provides in applicable part:

The provider shall . . . Respond to the infant or newborn's attempts to communicate.

12. Minn. R. 9502.0435, subp. 6, regarding hazardous activity materials, provides in applicable part:

Knives, matches, plastic bags, and other potential hazards must be kept out of the reach of infants, toddlers, and preschoolers. The use of potentially hazardous materials and tools must be supervised.

Violation Not Found

13. The Department failed to establish reasonable cause to believe that Licensee violated Minn. R. 9502.0435, subp. 6, when a child discovered a knife in the back yard and took it home without Licensee having knowledge of its existence.

14. There is insufficient evidence to establish reasonable cause to believe that Licensee failed to supervise the children when they were outside in the back yard on July 18, 2012 or July 19, 2012, or before in violation of Minn. Rule 9502.0315, subp. 29a.

Violations Found

15. The Department established reasonable cause to believe that, as the person responsible for all children in her care, Licensee violated Minn. R. 9502.0395 by the following:

a. failing to provide each child guidance at all times that helps the child acquire a positive self-concept, self-control, and teaches acceptable behavior, in violation of subp. 1;

b. failing to ensure that all behavior guidance used by caregivers was constructive, positive, and suited to the age of the child, in violation of subp. 1B;

c. failing to ensure that methods of intervention, guidance, and redirection were used at all times, in violation of subp. 1B;

d. allowing Monique Walls to emotionally abuse children in by name calling, ostracism, shaming and derogatory remarks directed at them, including but not limited to calling them "nigger," telling them constantly to "shut up," in violation of subp. 2A;

e. allowing Monique Walls to threaten, humiliate and frighten children through threats of corporal punishment and naps as punishment, in violation of subp. 2A;

f. allowing Monique Walls to strike a child on July 18, 2012;

g. allowing Semaj Kennedy to tell a child, "I don't even like you" when the child was seeking to be picked up and held, in violation of subp. 2A.

h. separating an infant from the group for disciplinary reasons, in violation of subp. 2E.

16. The Department established reasonable cause to believe that Licensee violated Minn. R. 9502.0395 on July 18, 2012 when she verbally threatened to put children down for naps to get them to sit down and be quiet.

17. The Department established reasonable cause to believe that Licensee violated Minn. R. 9502.0415, subp. 4B on July 18, 2012 when she told the other caregivers to leave the crying infant upstairs in the bedroom.

Reasonable Cause Conclusions

18. When the Order was issued on August 9, 2012, there were specific articulable facts and circumstances indicating that: Licensee had been present during times when Monique Walls verbally humiliated and threatened day care children and failed to take action; and Licensee utilized the threat of naps as a form of behavior guidance. In addition this provided the Department with a reasonable suspicion to believe that all of the children in Ms. Kennedy's care were at imminent risk of harm.

19. Licensee's daughter remains as a caregiver as of the date of the hearing. Also, un rebutted as of the date of the hearing is the evidence suggesting that Licensee's supervision of Monique Walls was inadequate, even when there are undisputed facts suggesting that Licensee knew or should have known that Ms. Walls verbally abused children. These facts are sufficient to provide the Department with a reasonable suspicion to believe that all of the children in Ms. Kennedy's care remain at imminent risk of harm.

20. These Conclusions are reached for the reasons set forth in the Memorandum below, which is hereby incorporated by reference into these Conclusions.

21. The Administrative Law Judge adopts as Conclusions any Findings that are more appropriately described as Conclusions, and as Findings any Conclusions that are more appropriately described as Findings.

Based upon these Conclusions, and for the reasons explained in the accompanying Memorandum, the Administrative Law Judge makes the following:

RECOMMENDATION

Based upon these Conclusions, the Administrative Law Judge recommends to the Commissioner of Human Services that:

- 1) The temporary immediate suspension of the family day care license of Sonji Kennedy be continued; and
- 2) The August 27, 2012 Protective Order of the Administrative Law Judge shall remain in effect.

Dated: October 18, 2012

s/M. Kevin Snell

M. Kevin Snell

Administrative Law Judge

Reported: Digitally recorded; no transcript prepared.

NOTICES

This report is a recommendation, not a final decision. The Commissioner of This report is a recommendation, not a final decision. The Commissioner of Human Services (the Commissioner) will make the final decision after a review of the record. Under Minn. Stat. § 14.61, the Commissioner shall not make a final decision until this Report has been made available to the parties for at least ten calendar days. The parties may file exceptions to this Report and the Commissioner must consider the exceptions in making a final decision. Parties should contact Lucinda Jesson, Commissioner of Human Services, P.O. Box 64998, St. Paul MN 55155, (651) 431-2907 to learn the procedure for filing exceptions or presenting argument.

The record closes upon the filing of exceptions to the Report and the presentation of argument the Commissioner, or upon the expiration of the deadline for doing so. The Commissioner must notify the parties and Administrative Law Judge of the date the record closes. If the Commissioner fails to issue a final decision within 90 days of the close of the record, this Report will constitute the final agency decision under Minn. Stat. § 14.62, subd. 2a. In order to comply with this statute, the Commissioner must then return the record to the Administrative Law Judge within ten working days to allow the Judge to determine the discipline imposed.

Under Minn. Stat. § 14.62, subd. 1, the Commissioner is required to serve its final decision upon each party and the Administrative Law Judge by first class mail or as otherwise provided by law.

MEMORANDUM

Burden of Proof

During an expedited hearing regarding a temporary immediate suspension, the Commissioner of Human Services is not required to prove that actions by individuals or violations actually occurred. Instead, at this stage, the Commissioner must only present reliable oral testimony and/or reliable documentary evidence sufficient to prove that there is reasonable cause to believe that the health, safety or rights of children in the Licensee's care are at imminent risk. In this type of proceeding "reasonable cause" is defined as the existence of specific articulable facts or circumstances which provide the commissioner with a reasonable suspicion that the health, safety or rights of children in the Licensee's care are at imminent risk of harm.⁴⁹ This is a very modest standard, intended to insure that vulnerable children are protected until there can be a full hearing and final determination on the underlying charges, facts and circumstances.

The Administrative Law Judge, at this stage of the process, is not required to assess the relative credibility of all conflicting evidence, but rather is to determine whether there is enough evidence to maintain the suspension. In this case, there was significant conflicting evidence and testimony regarding the context, meaning and intent of many statements made to, and in the presence of, day care children in Licensee's home. Whether corporal punishment occurred is also in dispute. However, the resolution of those contradictions is not necessary for the decision in this proceeding. The decision that must be reached is whether there are specific, articulable facts that would lead a reasonable, prudent person to suspect that children in Licensee's care are at imminent risk of psychological or physical harm.

Opinions of Day Care Parents

There is evidence in the record, in the form of letters, from current and former daycare parents, indicating that they believe Licensee provides a safe environment for their children. Although the Minnesota Court of Appeals has determined that such evidence is relevant and desirable in TIS cases,⁵⁰ it is entitled to little weight in this proceeding for three reasons. First, only one of the parents that wrote letters has listened to any portion of the July 2012 recordings. Therefore most parents have no knowledge of the contents of the July 18 –19, 2012 recordings that provide the basis for the TIS. Second, some of the letters appear to have been written by parents whose children may not have been in Licensee's care after Ms. Walls was hired. Third, several of the letters are from 2008 to 2011, and have no bearing on the issues involved in this proceeding. Finally, the letters of support will have more relevance in a future licensing proceeding.

⁴⁹ Conclusion .

⁵⁰ *In Re Strecker*, 777 N.W.2d 41, 46 (Minn. App. 2010).

Articulable Facts That Establish a Reasonable Suspicion

There is no dispute about the several factual circumstances that are material to the decision in this matter. First, Monique Walls' loud, vulgar, insulting, and disrespectful verbal abuse of day care children was consistent and recurring, when she used the terms "ass", "nigger," and "shit" repeatedly in the presence of children.

In approximately seven hours of the clandestine recording, Ms. Walls told different children to "shut up" in excess of 30 times, and called them "nigger" six times. Use of the term "nigger" is inappropriate by a person of any race. Directing such a pejorative term at a young child is not "guidance that helps the child acquire a positive self-concept, self-control and teaches acceptable behavior." Its use in the presence of a child would do quite the opposite by instilling a negative self-concept and teaching unacceptable behavior.

The evidence suggests that both Licensee and her daughter were present when much of the verbal abuse occurred. Ms. Semaj Kennedy testified that Ms. Walls used inappropriate language often, that Ms. Walls is simply "mean," that Ms. Walls is always loud and yelling, and that, "you have to get used to it." There is no evidence in the record to suggest that Licensee took any action to stop or correct Ms. Walls' inappropriate behaviors.

Second, another caregiver, Licensee's daughter, utilized sarcasm towards a one-year-old child when she told an emotionally needy child that, "I don't even like you." Both Licensee and her daughter testified that they considered this behavior a cultural sign of affection. The ALJ concludes that sarcasm is a concept that is neither likely to be understood by a child that age regardless of culture, nor could a reasonable person consider it constructive, positive and suitable for a one-year-old.

Third, determination of whether the allegations of spanking, slapping and hitting of children actually occurred is not necessary in this proceeding. A future licensing or maltreatment proceeding will give the parties the opportunity to fully examine whether those events occurred. However, there are sounds present in the recordings that, combined with the threats of spanking that did occur, would provide reasonable, prudent persons to suspect that such corporal punishment occurred.

Finally, Licensee neither articulated a firm understanding of the regulatory standard for appropriate behavior guidance, nor did she offer assurances that the type of verbal abuse suffered by day care children in her care would not reoccur in the future.

Conclusion

The foregoing facts alone are sufficient to allow a reasonable, prudent person to suspect that children in Licensee's home remain at imminent risk of harm. Although actual harm is not required in these situations, the evidence suggests that emotional harm to children in Licensee's care has occurred.

Due to the combination of the foregoing factors, the Administrative Law Judge cannot determine that the Department failed to show reasonable cause. The evidence indicates that there remains a reasonable suspicion that there is a risk of imminent harm to children in Licensee's care. The Administrative Law Judge respectfully recommends to the Commissioner that the TIS be continued.

M. K. S.